

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF Michigan
Plaintiff-Appellee,

-VS-

CEDRIC PIPES
Defendant-Appellant.

MSC No:
129152

COA No:
258262

Wayne County Circuit Court
No: 02-05202-02

APPELLANT'S BRIEF ON APPEAL
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PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF-APPELLEE,

MICHIGAN SUPREME
COURT NO: 129152

-VS-

COURT OF APPEALS NO:
258262

CEDRIC PIPES
DEFENDANT-APPELLANT.

_____/

WAYNE COUNTY CIRCUIT COURT NO: 02-05202-02

_____/

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APPELLANT'S ANSWER TO APPELLEE'S APPLICATION

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**STATEMENT OF JURISDICTION
AND RELIEF SOUGHT**

Defendant accepts Plaintiff's Statement of Jurisdiction.

The Application should be denied and the Court of Appeals decision affirmed.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN DETERMINING DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A SEPARATE TRIAL, WHICH WAS BASED ON THE CO-DEFENDANT'S PRETRIAL ASSERTION HE WOULD BE TESTIFYING?**

Court of Appeals Did Not Answer

People Answer: Yes

Defendant Answers: No



STATEMENT OF FACTS

Defendant concurs with Plaintiff's Statement of Facts, except as otherwise noted.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DETERMINING DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A SEPARATE TRIAL, WHICH WAS BASED ON THE CO-DEFENDANT'S PRETRIAL ASSERTION HE WOULD BE TESTIFYING.

Standard of Review

Review of a trial court's decision to deny a motion for separate trials is reviewed for an abuse of discretion. People v. Hana 447 Mich 325, 349; 524 NW2d 682 (1994).

However, constitutional issues are de novo. People v. Katt 468 Mich. 272, 278; 662 NW2d 12 (2003).

Argument

Defendant submits the Court of Appeals correctly determined the trial court abused its discretion in failing to grant defendant's motion for a separate trial.

The trial court had based its decision partly up on the codefendants indication that he would be testifying at trial, waiving his right against self-incrimination.

The Court of Appeals correctly determined that a defendant may not force a codefendant to testify when that codefendant has subsequently exercised his constitutional right against self-incrimination.

Prior to trial, the trial court denied defendant's request for a separate trial. At that time, both defendants had indicated they may be testifying at trial. It was on this basis as well as the court's conclusion that the defenses were not mutually exclusive or irreconcilable that the trial

court denied defendant's motion for a separate trial. While the court was well aware that each had given more than one custodial statement, the statements were subsequently admitted without any form of redaction.

The Court of Appeals found the trial court erred by failing to give sufficient consideration to the prosecutor's intention to offer the un-redacted custodial statements to the same jury. (COA, # 247718, unpubl, p 6). They found the statements were conflicting, noting that even the jury was unable to determine the identity of the actual shooter, because neither defendant was convicted of the felony firearm count. (COA, # 247718, unpubl, p 8).

The dissent found the pretrial posture of the co-defendant operated as a waiver of the right of this defendant to now 'cry foul' relative to the trial court's denial of the motion for separate trial or jury.

It is well settled that admission of a nontestifying codefendant statement against a defendant in the joint trial violates the Confrontation Clause under both state and federal constitutions. US Const Am VI; Mich Const 1963, art 1, §20. Bruton v. United States 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

While the prosecutor and Court of Appeals suggest Defendant Pipes waived this constitutional error by the pretrial position of co-Defendant Key, defendant submits it is impossible for one defendant to waive any claim of appellate error on the basis of the actions of a co-defendant.

Waiver has been defined as the 'intentional relinquishment or abandonment of a known right.' People v. Riley 465 Mich 442, 448; 636 NW2d 514 (2001), citing People v. Carter 462 Mich 206; 612 NW2d 144 (2000); People v. Lueth 253 Mich App 670, 688; 660 NW2d 322 (2002).

This Court has concluded a constitutional right may be waived including any Confrontation Clause error, where the unanticipated hearsay testimony of a defense witness incriminated him when he called her as a witness at trial, because the defendant himself was aware his own witness might do so. Riley, supra

Such a situation has not been presented in the instant case. Defendant did not intentionally relinquish or abandon his constitutional right of confrontation. While he was aware that his co-defendant was planning on testifying, he had also requested a separate trial or his own jury.

The right to confront the witnesses the prosecution seeks to introduce as evidence against him is a basic constitutional right afforded to every defendant. Crawford v. Washington 541 US 36; 124 SCt 1354; 158 LEd2d 177 (2004).

In this case, defendant did not invite appellate error. He had asked for and was denied a separate trial. He had asked for and was denied a separate jury. The prosecution then presented the un-redacted statements of his codefendant, which he conceded was error, as evidence against him at trial. The statements, which minimized the speaker's involvement but maximized defendant's involvement in the offenses, could not be challenged in the crucible of cross-examination.

To hold a defendant intentionally relinquishes or abandons a basic constitutional right, based on the pretrial offer of proof of another party, a codefendant, who subsequently exercises his Fifth Amendment right against self-incrimination and does not testify, is incorrect. Defendant did not invite the waiver by his own actions. Riley, supra; Carter, supra.

To so hold would require trial counsel to rigidly adhere to pretrial strategy, neglecting the fluidity of trials and their attendant shift in strategic maneuvering by both sides.

The Court of Appeals decision was correct.

While the prosecutor admits the trial court erred in admitting the co-defendant's statements without the application of some remedial measures, he contends the error was harmless. Defendant disagrees.

Harmless error analysis focuses on whether the error undermined the reliability of the verdict. People v. Cornell 466 Mich 335, 363-364; 646 NW2d 127 (2002); People v. Lukity 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The prosecutor attempts to minimize any damage done by noting the 'final' version of the co-defendant's statement was consistent with defendant's own statement. He seeks to minimize the prior statements which do not conform to defendant's own statements. He overlooks the fact that the co-defendant made several custodial statements, minimizing his own role in the offense while maximizing defendant's role. The co-defendant blamed defendant for the shooting for a variety of reasons.

The prosecution desires to replace the role of the trier of fact, the jury, with a harmless error analysis.

However, if the statements had not been admitted at defendant's trial, the jury, the ultimate trier of fact, would have had to determine whether or not defendant was involved, based on the evidence of his own statements, which did not indicate he had done the shooting, and were inconsistent, and one other witness, Terence Mitchell, whose testimony, was also inconsistent at best. Mr. Mitchell had disagreed with the information he had given to the police as well as at the investigative subpoena.

Without the statements of the co-defendant, the evidence against defendant was not overwhelming. There was a reasonable possibility that the jury would not have convicted defendant of the charged offense. Even given the improper admission of the co-defendant's

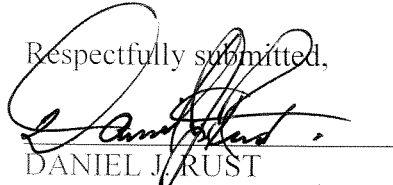
statement, they were unable to conclude defendant had a weapon. Thus the reliability of the verdict was undermined. Cornell, supra.

The application should be denied.

SUMMARY AND RELIEF SOUGHT

For the foregoing reasons, Defendant-Appellant respectfully requests this Honorable Court deny the Application of the prosecutor.

Respectfully submitted,



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